Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Reexamination of the Comparative Standards and Procedures for Licensing Noncommercial Educational Broadcast Stations and Low Power FM Stations	)	MB Docket No. 19-3

To: the Commission:

COMMENTS OF DISCOUNT LEGAL

Michael Couzens and Alan Korn, d/b/a Discount Legal, here submit comments in the Commission's Proceeding to revamp the authorization process for noncommercial educational (NCE) and low power FM (LPFM) stations, Notice of Proposed Rulemaking ("Notice"), FCC 19-9, released on February 15, 2019, 84 FR 10275 (3/20/2019). Couzens and Korn are California attorneys practicing before the Commission who developed a service plan to assist community applicants in the 2007 NCE filing window. We offered to provide complete legal advice in preparing an initial application, for a low fixed price. The purpose of the plan was not to make a lot of money, but to make the filing opportunity easily navigable for a variety of local public interest noncommercial entities. In both respects we were very successful. As anticipated the project did not make us rich. But with the collaboration of a cadre of fantastic telecommunications consulting engineers, we were able to file applications that incubated a large number of community radio stations, licensed and operating today. We used the model again in the 2010 window for filings on vacant NCE allotments, and once again in the October, 2013, LPFM window. Attachment 1 hereto is a list only of NCE stations that we helped foster, currently licensed and on the air.

As a preliminary comment, many common mistakes by applicants would be avoided by if they give close attention to the instructions accompanying the application forms, FCC Form Nos. 340 and 318. In turn the Commission should be concerned that these forms have become daunting in their complexity, especially for those not schooled in the Commission's practice and procedures. The Form No. 340 (May, 2017) contains 18 pages of fine-print double-columned instructions, and 27 pages of work sheets. We recognize that the bulk of this material is legally necessary but, for example, references to Commission rule making dockets and policies, beyond the Rules, only impart

constructive notice, at best, and create a challenge for the uninitiated. The work sheets actually are quite helpful compared with the instructions. But prior to submission of a revised forms to the Office of Management and Budget, all this material should be carefully pre-tested with a team that includes at least one lay person, and slimmed down where possible.

These observations apply with even greater force to Form No. 318 (October, 2013 ed.), the application for LPFM where, as he Commission recognizes, the applicants may have fewer resources and may be less versed in FCC arcana. Form 318 has twelve pages of fine-print instructions and five pages of work sheets. Commendably the instructions assist the user with a number of hot links to necessary background material. In the revisions to come, that reference technique should be exploited wherever possible, and expanded in the Form 340 where the few current hot links can be vague or even inoperative.

1. SECONDARY GRANTS

In describing the current authorization, the Notice states that "The applicant with the highest score in a group is designated a 'tentative selectee.' All other applicants are dismissed," Notice at para. 14. As we have argued at length, this is not a necessary result. In some cases it wastes an opportunity to expand new service to the public, by identifying possible secondary selectees in the same group.

Given the pent-up demand from application freezes, when the 2007 window opened some 3600 applications were filed. Many of these were in a pattern known as "daisy chains," with mutual exclusivities created either with close-by use of the same or neighboring channels, or by prohibited contour overlap across distances, or both, and sometimes having sequential conflicts spanning wide distances. Once a point system tentative selectee is determined and confirmed, all applications in MX conflict to the winner have been dismissed. But on the outskirts of the group there may exist applicants not in conflict with the winner, that can and should become secondary tentative selectees.

At reconsideration in 2001 of the initial report and order creating the point system, a petitioner asked the Commission to go through long daisy chains and pick a starting point that would free up the maximum number of authorizations. In our view now and in the view of the Commission at the time, that idea held the danger of a kind of arbitrariness or favoritism that surely would give rise to extended litigation. In rejecting the approach the Commission said:

> Rather than issue authorizations to applicants whose potential for selection stems primarily from their position in the mutually exclusive chain, we believe it is appropriate to dismiss all of

the remaining applicants and permit them to file again in the next filing window.[1]

Respectfully, this was a false dichotomy. Instead of making an optimized selection up and down the daisy chain, we have advocated that the entire chain be run normally though the point system determination process, so that one or more tentative selectees are ascertained based on points and tie-breakers. Thereafter once the tentative selection becomes final, the applicants who are MX with the winner would be dismissed. All other applicants not MX with the winner would be accorded normal processing, perhaps to identify other successful tentative selectees.

At the 2001 reconsideration, the Commission speculated: ". . . after the best qualified applicant is selected, it is possible that remaining applicants that are not mutually exclusive with this primary selectee and thus potentially secondary selectees, may also be significantly inferior to other applicants that are eliminated because they are mutually exclusive with the primary selectee." Id. 5015 at para. 90. We have argued before and now submit: There is no relevant comparison between an applicant that is in MX conflict with the tentative selectee and one that is not. The former is unqualified technically, 47 U.S.C. Sec. 308(b), and must be dismissed. The latter is potentially fully qualified and should receive normal processing. That one versus the other may have comparatively superior point system portfolios is irrelevant -- no more relevant than the fact that an application dismissed for defective engineering may have a better point system outlook than somebody else's still-pending application.[2]

Equally unpersuasive is the Commission's suggestion, in 2001, that dismissed applicants can always reapply at the next window. Today we are twelve years on from the 2007 filing window, and the next one will not occur until finality in this rule making, perhaps not before 2022, some fifteen years later. The Commission in 2001 could have had no idea that windows recur only once every fifteen years or so. It follows that every effort should be made to maximize new service from the totality of applications in each window.

We pressed these arguments in two cases to the full Commission level, *Greene/Sumter Enterprise Community*, 30 FCC Rcd 7694, FCC 15-87 released on July 15, 2015; *Hawaii Public Radio, Inc*., 30 FCC Rcd 13775, FCC 15-152 released on November 18, 2015. In *Hawaii, Id*., our applicant in 2007 was a respected local school applying to serve Waimea, in an underserved area on the

1 Reconsideration, 16 FCC Rcd. 5074 (2001), partially reversed on other grounds, *NPR v. FCC*, 254 F.3d 226 (D.C. Cir., 2001), at 5105 para. 90.

2 The idea that applicants must be dismissed because they might compare unfavorably with unqualified applicants who are being dismissed is a clear violation of the rights of secondary applicants to be compared on all relevant differences, and not to be compared on immaterial differences, *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 66 S. Ct. 148, 90 L. Ed. 108.

Northern part of the Big Island. When the window closed, it found itself in a sprawling daisy chain spanning several other islands and some 57 applications. The staff resolved the case down to a single selection, for applicant Hawaii Public Radio at Kailua, on the North Shore of Oahu, roughly three hundred miles and seven channels (Ch. 204 versus Ch. 211) from our proposal. When that selection became final, all 56 others were dismissed. In that case, only three applicants, the winner, ours and one other, were credited with a dispositive first service population preference under 47 U.S.C. Section 307(b). It would have been trivial to run a secondary contest between the remaining two superior applicants. Citing precedent the Commission refused to do so. We are constrained to say, What a waste.

On review in *Greene/Sumter* the Commission stated that the relief sought "would best be considered under notice-and-comment rule making procedures" para. 8. The Commission's decision in *Hawaii* was to the same effect: "[A]ny suggested revisions to that policy are more appropriately considered in the context of a notice and comment rulemaking proceeding rather than in a fact-specific adjudicatory proceeding such as this," *Hawaii*, *supra*, para. 4. Of course the actual facts in the Hawaii case are a damning comment on the policy. But we abide by the suggestion, and urge the Commission in this rule making proceeding to make provision for a rule, in appropriate cases, allowing for secondary grants, delivering additional new service to the public from each window filing opportunity.

2. A PREFERENCE FOR RETURNING APPLICANTS

The Notice, at paras. 37-40, raises the possibility of expanded tie-breaker criteria, but offers no specifics and invites comment, para. 40. We have a recommendation. We suggest that applicants be granted a dispositive tie-breaker preference who can demonstrate that they (a) applied in a previous filing window, and had their application accepted for filing and processed, and then dismissed in favor of an applicant possessing superior point system or tie-breaker showings; and (b) were in continuous existence as a legal entity at all times from the date of the previous filing down to the present. Granting this preference in the point system itself could lead to results inconsistent with the point system priorities. But as a dispositive tie breaker this factor would be an additional, fair means to resolve any group of applicants with front runners tied on points.

Those involved with public radio and TV can recall the grants made under the U.S. Commerce Department's Public Telecommunications Facilities Program. Those applying in a second or third round had a better chance than first-time applicants. The program administrators tended to reward

persistence and durable existence. Many private foundations and other government granting agencies operate the same way. Conferring an advantage on a returning applicant recognizes that its continuous interest and existence are demonstrable equities that favor an authorization. Such a tie breaker preference also may tend to curtail the harrowing possibility of an applicant, denied in a first window, denied in a second window, and having to re-apply 30 years later or even more.

3. A FEW HOUSE KEEPING POINTS

A. We agree with the Commission's proposal to eliminate documentation regarding the durability of NCE localism and diversity claims, paras. 2 and 1. Compliance did not present problem for applicants using our legal templates, and some competing filers may have foundered on this requirement. Still, these disputes were wasteful and served no public interest purpose. We also agree with the Commission in stating that "we will continue to require each applicant to submit documentation establishing its [localism] *bona fides* such as, inter alia, corporate materials from the secretary of state, and lists of names, addresses, and length of residence of board members. . . ." This statement is made only in a footnote, fn. 69, but needs to be stressed in the report and order, in the instructions and in the application form.

B. The Commission imposes a holding period requirement to assure that the public benefits of an award actually accrue in practice, Notice paras. 49 – 50. In the assignment context, the Commission apears to be concerned that an acquiring entity may not be bound by the requirement to maintain point system characteristics. The solution, para. 50, is to impose a requirement that the station operate in a manner consistent with the point system claims at all times and for four years after licensing. This makes sense. The staff has indicated to us, with respect to the two-year local incumbency, that an applicant for assignment would be measured looking back two years from its acquisition, not two years from the date of original window. This delivers the desired public benefit and we suggest that it be incorporated in the language of the rule.

C. Finally, the Commission proposes to liberalize the constraints on time sharing, to permit time sharing proposals to be communicated and developed at any time, para. 57. Our problem is with the point aggregation. As stated in the Notice, "[E]ach prevailing time share proponent is treated as a separate licensee." (para. 56) But in reality, and regardless of whether the time share is disclosed early or late, it will commonly happen that a single developer, consultant, church, school or other will plan from the outset to have two or more applicants, of essentially identical philosophy and mission, filing

separately to aggregate points. This might be OK if everyone knows the rules and is able to enter into the same point system "arms race" with the same tools. But note that a "Siamese twin" filer is not, in fact, doubling the public benefit of diversity, compared with a standalone applicant. Arguably the twin does foster local origination, but if the twins are indistinguishable in their programming approach, the magnified public benefit may be questioned once again. Now suppose five entities join together to aggregate points, intending in the process to scare off all competitors. Because their time share can never occupy more than the physical maximum of 168 hours per week, it makes no sense to credit the group with five times the maximum points, merely assuming vastly inflated public benefit. We suggest that, even though entities are encouraged to merge and join forces and time share, point aggregation probably needs to be capped at two participants.

CONCLUSION

We congratulate the Commission and its staff for this NPRM, which will bring about a number of refinement and improvements to the comparative process for NCE's and LPFM's. We look forward to the Commission wrapping this up at an early date, and opening windows to entertain new applications, broadening vibrant local radio service in the public interest.

Respectfully submitted

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